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Talking Israel and Palestine on Campus: How the U.S. Department of Education Can Uphold the Civil Rights Act and the First Amendment

YAMAN SALAHİ AND NASRINA BARGZİE*

Introduction

A surge in scholarly discussion and campus activism about Israel and Palestine at American universities has given rise to impassioned debates about the First Amendment in public higher education.¹ In the last four years, a few off-campus organizations have filed complaints with universities and with the federal government alleging that pro-Palestinian expression creates a hostile educational environment for Jewish students in violation of Title VI of the Civil Rights Act of 1964, often on the basis of nothing more than speech critical of Israel's practices or policies.² Responding to these complaints, universities around the country have investigated, disciplined, and in some cases suspended student organizations that

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1. Elizabeth Rodden, *Middle East Conflict, U.S. Campuses*, INSIDE HIGHER ED (June 17, 2014), <https://www.insidehighered.com/news/2014/06/17/pro-palestinian-student-activism-heats-causing-campus-tensions>.

2. Naomi Zeveloff, *Coming up Empty on Title VI*, JEWISH DAILY FORWARD (Mar. 13, 2012), <http://forward.com/articles/152691/coming-up-empty-on-title-vi>.

organize events and demonstrations critical of Israeli state policy and the treatment of Palestinians.³ Similar complaints have also prompted at least four federal investigations by the U.S. Department of Education's (hereinafter "DOE" or "Department") Office for Civil Rights (hereinafter "OCR") and one federal lawsuit, all of which concluded that speech critical of the state of Israel is protected under the First Amendment.⁴ Yet students and faculty continue to report many hurdles when scheduling programming of this sort, a trend that threatens to remove critically necessary dialogue about one of the most important contemporary foreign policy debates from university campuses.⁵

Institutional questions about the First Amendment and Title VI have ramifications for everyone in higher education and for OCR's role in enforcing civil rights laws, and are thus of interest even to those who do not stake a position in this particular political dispute. This Article analyzes these Title VI complaints and rejects their central premise: that students suffer from a hostile educational environment in violation of their civil rights when a particular country or government with which they may identify is subjected to vigorous critique or academic scrutiny. In this context, where the alleged misconduct is so closely related to core political speech, university administrators and OCR must be careful not to eschew either of their obligations under the First Amendment or Title VI. They cannot treat a civil rights complaint dismissively simply because it seems politically motivated, nor can they act in a manner that chills or curbs the vibrant political debate necessary in a democracy. This Article suggests that OCR may effectuate its Title VI obligations while minimizing the risk of directly or indirectly infringing First Amendment freedoms by filling a gap in its current policies: OCR has no policies acknowledging that government investigations may have an unconstitutional chilling effect even when protected speech is not a direct target, nor any guidance clarifying that speech supporting or opposing a government's policies does not, standing alone, give rise to a hostile environment for students who may identify with the country that government represents.

In Part I, we briefly describe the importance of student freedom of expression in higher education and legal protections for that right. In Part II, we briefly describe the legal framework for hostile

3. See, e.g., *infra* note 89.

4. See *infra* Part III.A.

5. See *infra* Part III.B.

educational environment claims under Title VI of the Civil Rights Act of 1964. In Part III, we provide an overview of the legal complaints filed in this context, their factual bases, OCR's disposition of the complaints, and the chilling impact of the investigations. In Part IV, we argue that the U.S. Department of Education's handling of these complaints has been flawed, and that the Department's current guidelines and policies are insufficient to handle complaints arising out of political disputes. Finally, we argue that the Department should adopt a policy to minimize the chilling effect of its investigations and issue guidance explaining the broad scope of constitutional protection for political expression.

I. Freedom of Expression on Campus

Freedom of expression is a right enshrined in the First Amendment to the United States Constitution.⁶ Our domestic constitutional rights are buoyed by the United States' obligations under the International Covenant on Civil and Political Rights (hereinafter "ICCPR")⁷ and the Universal Declaration of Human Rights,⁸ both of which explicitly protect freedom of speech.

6. U.S. CONST. amend. I.

7. Advocates have submitted a series of reports to the United Nations Human Rights Committee charged with reviewing U.S. compliance with the ICCPR, arguing that students should be able to engage in speech critical of nation states without reprisal. See ASIAN LAW CAUCUS, ET AL., ICCPR STUDENT SPEECH SHADOW REPORT (Dec. 2012), *available at* http://www.ushrnetwork.org/sites/ushrnetwork.org/files/26_asian_law_caucus_and_coalition.pdf; ASIAN LAW CAUCUS, ET AL., UPDATE TO ICCPR STUDENT SPEECH SHADOW REPORT (Sept. 2013), *available at* http://www.ushrnetwork.org/sites/ushrnetwork.org/files/25_page_319-323_student_speech_asian_law_caucus.pdf; ASIAN LAW CAUCUS, ET AL., UPDATE TO ICCPR STUDENT SPEECH SHADOW REPORT (Mar. 2014), *available at* <http://bit.ly/iccpr0314>. During the review of U.S. compliance with the ICCPR in March 2014, a Human Rights Committee member raised the issue of student speech about Palestinian human rights, and the U.S. State Department responded that such speech was protected. See Press Release, Office of the High Commissioner for Human Rights, Human Rights Committee Considers Report of the U.S. (Mar. 14, 2014), *available at* <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14383&LangID=E>.

8. Advocates have also submitted a shadow report in advance of the Universal Periodic Review of 2015, a review of U.S. compliance with its international treaty obligations. The report argues that the U.S. must take greater steps to remedy the chilling effect of the Title VI

Even before the Free Speech Movement at the University of California, Berkeley in 1964 fortified the university campus as the quintessential site of spirited political activism, the Supreme Court had recognized that students are not passive containers whose role is limited to receiving information from teachers and professors, but rather, active participants in an education that is also meant to inculcate awareness of democratic rights and liberties. In *West Virginia State Bd. Of Educ. v. Barnette*, for example, the Court struck down, on First Amendment grounds, a requirement that all students salute the flag as part of a regular program meant to inculcate patriotism.⁹ The Court emphasized that a school's role in "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."¹⁰ In other words, education serves its role not in "prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion or forc[ing] citizens to confess by word or act their faith therein,"¹¹ but rather, in facilitating the democratic process by introducing students to the freedoms necessary to its existence. Although *Barnette* involved religious, not political, objections to saluting the flag, it nevertheless foregrounds the necessity of providing students with the freedoms they will enjoy, and are expected to exercise, as citizens.¹²

In a series of cases, the Court repeatedly recognized that students in school are entitled to broad First Amendment freedoms. When New Hampshire's Attorney General attempted to compel a university professor to discuss the contents of his lectures about Marxism, the Court, siding with the professor, explained that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."¹³ Although the Court has affirmed time and

complaints and investigations discussed in this Article. See ASIAN LAW CAUCUS, UPR STUDENT SPEECH SHADOW REPORT (Apr.–May, 2015), available at <http://bit.ly/uprdoe>.

9. 319 U.S. 624 (1943).

10. *Id.* at 637.

11. *Id.* at 642.

12. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954) (stating that "education . . . is the very foundation of good citizenship").

13. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

again “that [academic] freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom,” which it called “peculiarly the marketplace of ideas,”¹⁴ the protections of the First Amendment have not been limited to highbrow academic and scholarly discussions because “[neither] students [nor] teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁵ Thus, courts have held that other modes of expression are also protected on public school campuses—including political protest,¹⁶ political association,¹⁷ literary expression,¹⁸ artistic performances,¹⁹ and religious association.²⁰ Of course, speech that is generally not protected under the First Amendment is not protected on campus either.²¹

Even when campus expression has involved sensitive, offensive, or controversial political topics that are said to disrupt the “tranquility” of campus, courts have rarely supported censorship unless a school’s functions have been “substantially” or “materially” disrupted.²² Thus, any attempt to pit student activism that seeks to

14. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (citation and quotations omitted).

15. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that public schools may not curb student expression without showing that it would materially and substantially interfere with the operation of the school).

16. *Id.*

17. *Healy v. James*, 408 U.S. 169 (1972) (disagreement with a student organization’s philosophy and unsupported fear it would disrupt campus environment insufficient to justify denying recognition under First Amendment).

18. *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022 (9th Cir. 1998) (rejecting Title VI claim for injunctive relief that sought to remove *The Adventures of Huckleberry Finn* from high school syllabus because the author’s use of n-word allegedly created hostile educational environment).

19. *Dibona v. Matthews*, 220 Cal. App. 3d 1329 (1990) (finding the school violated First Amendment when it canceled production of a play based on objections from the religious community, sensitivity of issues involved given recent local events, and “inappropriate” language).

20. *Widmar v. Vincent*, 454 U.S. 263 (1981) (finding that a public university that makes facilities generally available for registered student group activities could not exclude religious groups).

21. *See, e.g., U.S. v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (summarizing non-protected speech categories as “advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called ‘fighting words;’ child pornography; fraud, true threats; and speech presenting some grave and imminent threat the government has the power to prevent”) (citations omitted).

22. *See, e.g., Braxton v. Mun. Ct. of S.F.*, 10 Cal. 3d 138, 146 (1973) (“Neither the content of speech nor freedom of association can be restricted merely because such expression or association disrupts the tranquility of a campus or offends the tastes of school administrators or the public. . . . [C]ourts have never held that such ‘disruption’ falls outside the boundaries of the First Amendment.”). *But see Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764 (9th Cir. 2014) (high school did not violate minor students’ First Amendment rights by asking them to remove t-shirts featuring American flag because school officials reasonably

confront, through lawful means, human rights issues at odds with the "purpose" of education simply because it challenges deeply held opinions is bound to fail.

Those who perceive student activism and expression as a source of anxiety, potential disruption, or offensive behavior overlook the many benefits an environment which invites activism offers not only to activists themselves, but also to other students and to society at large. Students benefit from direct participation in campus organizing because engagement with issues of public importance often serves a pedagogical purpose in and of itself, as students learn the tools of civic engagement.²³ Students from marginalized communities in particular may find in student organizations a haven that permits them to develop as individuals, to discover their voices and identities in a way they would not otherwise be able to—particularly in the face of broader social structures of inequality and the way they may manifest in school curricula.²⁴ Furthermore, even students who are *not* activists benefit from the presence of students who expose them to stories, perspectives, and ideas with which they may not otherwise be familiar.²⁵ In recognizing the importance of diversity to the education of fellow students, the Supreme Court has implied that "peer-to-peer" education, based on interpersonal engagement and the sharing of different life experiences, cannot be derived from classroom instruction

forecasted material interference or substantial disruption, like fights between students); *Morse v. Frederick*, 551 U.S. 393 (2007) (high school did not violate minor students' First Amendment rights by seizing banner that promoted illegal drug use).

23. See, e.g., Ian K. Macgillivray, *Shaping Democratic Identities and Building Citizenship Skills through Student Activism: Mexico's First Gay-Straight Alliance*, 38 EQUITY & EXCELLENCE IN EDUCATION, no. 4, Nov. 2005, at 320 (conceptualizing student group's struggle to stay afloat despite opposition from conservative parents and teachers as a form of pedagogy that inculcates lessons about democratic values, navigating bureaucracy, effecting social change, and working with others who have diverging opinions).

24. See, e.g., Robert Cooper & Amanda Datnow, *Peer Networks of African American Students in Independent Schools: Affirming Academic Success and Racial Identity*, 66 J. OF NEGRO EDUCATION 56, 62 (1997) (empirical study observing that "[m]any of the students identified their African American peer group networks, both formal and informal, as one of the most important factors in helping them cope in the predominantly White environments of their schools and lessen the feelings of alienation," and students "indicated that these peer networks functioned in important ways to simultaneously foster school success and provide a mental space for them to reaffirm their racial identities").

25. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (arguing that the university "seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission" by "select[ing] those students who will contribute the most to the robust exchange of ideas") (quotation omitted); *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (explaining that benefits of diversity in education include "livelier, more spirited, and simply more enlightening and interesting" classroom discussion).

alone.²⁶ Finally, society at large benefits when students learn to engage with the issues they care about in a civic capacity. Some studies suggest student activists are more likely than their peers to remain involved in civic life when they become adults, even if the content of their politics and style of their activism change over time.²⁷ Youth may also be the source of or vehicle for ideas that challenge deeply established yet problematic practices or policies in our societies.²⁸

University administrators should be careful not to encumber or discourage vigorous activism and debate even when pursuing legitimate ends, like confronting unlawful harassment and discrimination, responding to acts of bigoted speech or conduct, or addressing acts of protest and civil disobedience that involve technical violations of campus rules or regulations. A heavy-handed response to technical rule-breaking (like unpermitted flyering) or isolated incidents of misconduct can have the unintended effect of discouraging lawful forms of protest or expression, activities that are beneficial to the educational process.

II. Legal Framework for Hostile Educational Environments on the Basis of Race, Color, or National Origin

In addition to providing space for robust and discordant expression on campus, whether in the classroom or the quad, universities have an obligation to ensure that students are protected from unlawful discrimination. Title VI of the Civil Rights Act of 1964 stipulates that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity

26. See *Grutter*, 539 U.S. at 330.

27. James Fendrich & Kenneth Lovoy, *Back to the Future: Adult Political Behavior of Former Student Activists*, 53 AMERICAN SOCIOLOGICAL REVIEW 780, 780-84 (1988) (finding that student activists were more likely to remain involved in democratic politics as adults, even when the content of their politics changes over time).

28. See, e.g., *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist.* #204, 523 F.3d 668, 677-78 (7th Cir. 2008) (Rovner, J., concurring) ("I heartily disagree with my brothers about the value of the speech and speech rights of high school students, which the majority repeatedly denigrates. Youth are often the vanguards of social change. Anyone who thinks otherwise has not been paying attention to the civil rights movement, the women's rights movement, the anti-war protests for Vietnam and Iraq, and the recent presidential primaries where the youth voice and the youth vote are having a substantial impact. And now youth are leading a broad, societal change in attitude towards homosexuals, forming alliances among lesbian, gay, bisexual, transgendered and heterosexual students to discuss issues of importance related to sexual orientation.") (citations omitted).

receiving Federal financial assistance.”²⁹ There are two ways to enforce Title VI’s requirements. First, the Supreme Court has recognized an implied individual cause of action for damages against schools that violate Title VI,³⁰ but only intentional discrimination is actionable.³¹ Second, federal agencies are authorized to enforce Title VI by terminating financial assistance.³² The U.S. Department of Education’s Office for Civil Rights accepts and investigates complaints alleging violations of Title VI and other civil rights statutes by federally funded institutes of higher education.³³

A recipient of federal funding is liable under Title VI not only for its own discriminatory acts, but also for what is known as a hostile environment claim. The Supreme Court first recognized hostile environment claims in *Davis ex rel. LaShonda D. v. Monroe County Board Of Education*, holding that an institution violates Title IX of the Civil Rights Act of 1964 if it “acts with deliberate indifference to known acts of harassment in its programs or activities,” even if the acts are committed by other students or third parties, and the harassment is “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”³⁴ To prevail under a hostile environment claim, a plaintiff must also demonstrate that the harassment resulted in a denial of educational opportunities,³⁵ and that

29. 42 U.S.C. § 2000d (1964).

30. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 703 (1979) (“We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination.”).

31. See *Alexander v. Sandoval*, 532 U.S. 275, 294 (2001) (“Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists.”); *Clyburn v. Shields*, 33 F. App’x 552, 556 (2d Cir. 2000) (“[N]o private cause of action exists to enforce disparate impact regulations promulgated pursuant to Title VI.”) (citing *Sandoval*, 532 U.S. 275).

32. 42 U.S.C. § 2000d-1 (1964).

33. See 34 C.F.R. pt. 100.

34. See *Davis ex rel. LaShonda v. Monroe Cty. Bd. Of Educ.*, 526 U.S. 629, 633 (1999). Although *Davis* is a Title IX case, Title VI is interpreted the same way. See, e.g., *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) (“Congress modeled Title IX after Title VI of the Civil Rights Act of 1964, and passed Title IX with the explicit understanding that it would be interpreted as Title VI was.”); *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (“Title IX . . . was patterned after Title VI of the Civil Rights Act of 1964.”); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 695-96 (1979) (“Title IX was patterned after Title VI . . . Except for the substitution of the word ‘sex’ in Title IX to replace the words ‘race, color, or national origin’ in Title VI, the two statutes use identical language to describe the benefited class The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.”).

35. See, e.g., *C.S. v. Couch*, 843 F. Supp. 2d 894, 908 (W.D.N.Y. 2011) (rejecting African-American middle school student’s Title VI claim for “fail[ing] to demonstrate a concrete,

the school was “deliberately indifferent,” meaning that its response to known acts of harassment was “clearly unreasonable.”³⁶ Thus, even if a school fails to put a full stop to harassment, it may still escape Title VI liability by showing it was not deliberately indifferent.

III. Title VI and Israel/Palestine on Campus

This Article considers three of the complaints the U.S. Department of Education has investigated over the past four years related to campus expression about Israel and Palestine: UC Berkeley (hereinafter “Cal”), UC Santa Cruz (hereinafter “UCSC”), and UC Irvine (hereinafter “UCI”).³⁷ Although the complaints also allege instances of unprotected conduct, like vandalism or physical confrontations, the following discussion demonstrates that the complaints focus overwhelmingly on traditional forms of protected expression like academic panels, film screenings, nonviolent protests, and leaflets.

negative effect on his education” like “dropping grades or increased absenteeism” after he reported nearly a dozen examples of harassment, including racial epithets, a “hate note” featuring a confederate flag and the messages “n—s beware” and “n—s must be hung,” and a separate comment that he should “go back to Africa”).

36. See, e.g., *N.K. v. St. Mary’s Springs Acad. of Fond Du Lac Wis., Inc.*, 965 F. Supp. 2d 1025, 1035 (E.D. Wis. 2013) (holding that private middle school’s response to racially charged bullying of Asian student was not “clearly unreasonable” and “did not rise to the level of deliberate indifference” after officials investigated incidents, spoke with students, and held conferences with parents and teachers, even when it failed to stop peer-on-peer harassment).

37. To our knowledge, three other Title VI complaints related to Israel/Palestine have been filed with OCR but we do not discuss them here. In June 2013, the Brandeis Center filed a complaint with OCR against UC Santa Barbara based on an alleged anti-Jewish comment at a student government hearing concerning whether to support divestment from the Israeli occupation. Brandeis Center withdrew the complaint in December 2013 before OCR decided whether to accept it for investigation. Thus, there is no OCR activity to analyze. In September 2011, OCR opened an investigation into a complaint against Barnard College alleging a counselor illegally “steered” a Jewish student from a professor’s class because she might feel “uncomfortable” given his views about Israel/Palestine. OCR’s investigation was closed in 2012 after failing to substantiate the factual allegations, so OCR never reached the legal question whether a professor’s lectures could create a hostile environment. See Sammy Roth, *Investigation Finds No Discrimination at Barnard*, COLUMBIA SPECTATOR (Jan. 13, 2012), <http://columbiaspectator.com/2012/01/13/investigation-finds-no-discrimination-barnard>. Finally, in 2011, OCR investigated a complaint that Rutgers University violated Title VI when organizers of a campus event about Israel/Palestine charged a discriminatory admission fee to Jewish students only. We do not discuss this complaint because, on its face, it alleges unlawful discrimination, as distinct from expressive activity. After a three-year investigation, OCR dismissed the complaint finding no evidence a discriminatory fee was actually charged. See Letter from OCR to Rutgers University (July 31, 2014) (RE: Dismissal of Case No. 02-11-2157) (on file with authors).

A. Overview of the Investigations at UC Berkeley, UC Irvine, and UC Santa Cruz

1. UC Berkeley (Federal Lawsuit and OCR Complaint)

In 2011, Jessica Felber, a UC Berkeley alumna, sued Mark Yudof, President of the University of California, alleging, *inter alia*, that UC Berkeley had violated her rights under Title VI for failing to stop “mock checkpoint” events on campus organized by Students for Justice in Palestine (hereinafter “SJP”) and the Muslim Students Association (hereinafter “MSA”), whom the complaint accused of “campus terrorist incitements,” “pro-terrorist programs, goals, and conduct,” “ties to terrorist groups including Hamas and the Muslim Brotherhood,” and being “incubator[s] to recruit and radicalize students to support Hamas.”³⁸ The University moved to dismiss the case partly on First Amendment grounds, arguing:

Plaintiffs’ own allegations make clear that the majority of the incidents about which Plaintiffs complain consisted of students engaging in speech on controversial political matters—speech which is at the core of First Amendment protection. Many of the incidents cited in Plaintiffs’ Complaint involved speech in opposition to Israeli policies . . . and which thus plainly related to matters of public concern The fact that Plaintiffs may have been upset by speech critical of Israel does not make it illegal harassment rather than protected speech.³⁹

The district court agreed, and dismissed plaintiffs’ Title VI claim, holding “a very substantial portion of the conduct to which plaintiffs object represents pure political speech and expressive conduct, in a public setting, regarding matters of public concern, which is entitled to special protection under the First Amendment.”⁴⁰ The court also determined that plaintiffs failed to demonstrate they “suffered severe and pervasive harassment,” failed to show they were “denied access to the University’s educational services in any meaningful sense,” and

38. See First Amended Complaint at 6, 21, *Felber v. Yudof* (May 8, 2012) (Case No. C 11–1012 RS, Dkt. 15) available at http://www.investigativeproject.org/documents/case_docs/1695.pdf.

39. See U.C. Defendants’ Motion to Dismiss First Amended Complaint at 16–17, *Felber v. Yudof* (July 5, 2011) (Case No. C 11–1012 RS, Dkt. 29), available at http://www.investigativeproject.org/documents/case_docs/1710.pdf.

40. *Felber v. Yudof*, 851 F. Supp. 2d 1182, 1188 (N.D. Cal. 2011).

failed to show the university acted with “deliberate indifference.”⁴¹ With the court’s leave, Plaintiffs filed a Second Amended Complaint,⁴² and Defendants renewed their motion to dismiss.⁴³ While Defendants’ motion to dismiss was pending seven months later, the parties entered into a settlement agreement in which the university did not admit wrong-doing but agreed to study its protest policies without promising specific changes.⁴⁴ The suit was subsequently dismissed with prejudice.⁴⁵

Within days of settling the litigation, the plaintiffs’ attorneys filed a complaint raising nearly identical Title VI allegations with OCR.⁴⁶ The complainants likened the “mock checkpoints” to notorious passion plays in Europe, which incited pogroms and other violence against Jewish communities.⁴⁷ Even though a federal court had already adjudicated the claims, OCR opened an investigation on September 11, 2012.⁴⁸ OCR closed the investigation on August 19, 2013, concluding that three out of five timely issues raised in the complaint⁴⁹ “describe events that constituted expression on matters of public concern

41. *Felber*, 851 F. Supp. 2d at 1188.

42. See Second Amended Complaint, *Felber v. Yudof* (Jan. 6, 2012) (Case No. C 11–1012 RS, Dkt. 60), available at http://www.investigativeproject.org/documents/case_docs/1906.pdf.

43. See UC Defs.’ Mtn. to Dismiss Second Amended Complaint, *Felber v. Yudof* (Jan. 20, 2012) (Case No. C 11–1012 RS, Dkt. 61), available at http://www.investigativeproject.org/documents/case_docs/1710.pdf.

44. See Dan Mogulof, *Plaintiffs in Felber v. Yudof Case Dismiss Lawsuit*, UC BERKELEY NEWS CENTER (July 12, 2012), <http://newscenter.berkeley.edu/2012/07/12/plaintiffs-in-felber-v-yudof-case-dismiss-lawsuit>.

45. See Order Dismissing Action With Prejudice, *Felber v. Yudof* (July 24, 2012) (Case No. C 11–1012 RS, Dkt. 88).

46. Letter from Joel H. Siegal and Neal M. Sher to Thomas Perez and Arthur Zeidman (July 9, 2012) (RE: Title VI Complaint against the University of California, Berkeley), available at http://brandeiscenter.com/images/uploads/cases/title_VI_Complaint_9_July_12a.pdf.

47. See *id.* at 3 (“The Berkeley Apartheid Week can only be seen as a modern day version of the ‘Passion Play’, the notorious anti-Semitic performance, initially performed at Oberammergau, Bavaria which portray [sic] Jews as bloodthirsty and treacherous villains.”).

48. Letter from Arthur Zeidman, Director of OCR’s San Francisco Enforcement Office to Chancellor Robert Birgeneau of UC Berkeley (Sept. 11, 2012) (RE: Case No. 09-12-2259) (on file with authors).

49. Respectively, OCR summarized these three complaints as: 1) “the complaint alleged that mock military checkpoint demonstrations held on campus during Israeli Apartheid Week by Students for Justice in Palestine in 2012, created a hostile environment on the basis of national origin for Jewish students”; 2) that “during a Survey of World History course, a professor offended a Jewish student when she commented on Israeli air strikes but did not discuss any other current political issue”; and 3) that “participants made statements against Jews during recent Associated Students Union of the University of California meetings to discuss a student senate bill resolution calling for the divestment of University funds from companies that support Israel’s military in the Palestinian territories.” Letter from Zachary Pelchat of OCR to Chancellor Robert Birgeneau of UC Berkeley at 1 (Aug. 19, 2013) (RE: Case No. 09-12-2259), available at http://newscenter.berkeley.edu/wp-content/uploads/2013/08/DOE.OCR_.pdf.

directed to the University community” that “do not constitute actionable harassment.”⁵⁰ OCR noted that “[i]n the university environment, exposure to such robust and discordant expressions, even when personally offensive and hurtful, is a circumstance that a reasonable student in higher education may experience.”⁵¹

The fourth and fifth incidents—which respectively dealt with defacement of a pro-Israel student organization’s sign and placement of a swastika on a Jewish student’s dorm room door by unknown individuals—were dismissed because the University had not been informed of either incident, and thus, could not be said to have been “deliberately indifferent.”⁵²

The complainants filed an administrative appeal of OCR’s decision on October 4, 2013.⁵³ On June 6, 2014, OCR rejected the appeal, noting that “the issues raised in your appeal do not warrant a change in OCR’s disposition of your case under the laws and regulations enforced by OCR.”⁵⁴

2. UC Santa Cruz (OCR Complaint)

In June 2009, Tammi Rossman-Benjamin, a lecturer at UC Santa Cruz and the founder of the Amcha Initiative, a group that claims to “combat anti-Semitic behavior on college and university campuses,”⁵⁵ filed a 29-page complaint with OCR alleging a hostile environment for Jewish students in violation of Title VI.⁵⁶ The first allegation concerned a campus college’s sponsorship of an event called “Pulse on Palestine,” which included a screening of a documentary film critical of Israel’s occupation of the Palestinian territories followed by a panel discussion with an independent journalist and a community activist moderated by a UCSC history professor.⁵⁷ Rossman-Benjamin

50. Letter from Zachary Pelchat to Chancellor Robert Birgeneau, *supra* note 49, at 3.

51. *Id.*

52. *Id.* at 1.

53. Letter from Complainants to Arthur Zeidman, (Oct. 4, 2013) (RE: Formal Appeal of August 19, 2013 Dismissal of Case No. 09-12-2259) (on file with authors); Michelaina Johnson, *Lawyers Ask Department of Education to Revisit Anti-Semitism Complaint*, DAILY CALIFORNIAN (Oct. 21, 2013), <http://www.dailycal.org/2013/10/21/lawyers-ask-department-education-revisit-anti-semitism-complaint>.

54. Letter from Arthur Zeidman to Complainants (June 6, 2014) (RE: Appeal of Case No. 09-12-2259) (on file with authors).

55. *Mission and Objectives*, THE AMCHA INITIATIVE, <http://www.amchainitiative.org/mission-and-objectives> (last visited Mar. 25, 2015).

56. Letter from Tammi Rossman-Benjamin to San Francisco OCR (June 25, 2009) (RE: Title VI violations at UC Santa Cruz) [hereinafter Letter RE: UC Santa Cruz Title VI Complaint] (on file with authors).

57. *Id.* at 3.

had asked the college to withdraw sponsorship because the event “was not going to educate students about the complicated situation in the Middle East” but rather “was a platform for anti-Israel propaganda” about which she claimed “many Jewish students would be deeply offended.”⁵⁸ Her efforts failed, and Rossman-Benjamin attended the event and later claimed it was anti-Semitic because, among other things, it suggested that “Israel is guilty of ethnic cleansing” and “Israel’s actions against the Palestinians is a form of colonialist aggression.”⁵⁹ The remainder of the complaint focused on similar events or on classroom discussions, objecting primarily to the way in which Israel’s policies or practices were discussed or characterized.⁶⁰ It is not until page 22 that Rossman-Benjamin refers to an incident unrelated to course commentary, panel discussions, or film screenings: the appearance of graffiti by unknown perpetrators in a campus hallway in April 2008 “depicting a plane flying into what appeared to be the Twin Towers, with a large Jewish star between them” and the number “666.”⁶¹

OCR dismissed the complaint on August 19, 2013, determining that four panel discussions and presentations forming the basis of the complaint “constituted (or would have constituted) expression on matters of public concern directed to the University community” that “do not constitute actionable harassment.”⁶² With respect to the allegation about offensive graffiti, OCR “determined that once such graffiti was reported, the University took prompt action to investigate the circumstances and to remove the graffiti.”⁶³ Notably, OCR’s investigation involved attempted outreach to 91 Jewish students who protested the events, but it was nevertheless unable to corroborate the complainant’s claims that the events created a “hostile environment.”⁶⁴ The complainant appealed OCR’s dismissal, but OCR rejected the appeal.⁶⁵

58. Letter RE: UC Santa Cruz Title VI Complaint, *supra* note 56, at 3–4.

59. *Id.* at 6.

60. *Id.*

61. *Id.* at 22.

62. Letter from San Francisco OCR to Carole Rossi, Chief Campus Counsel for UC Santa Cruz at 3 (Aug. 19, 2013) (RE: Case No 09-09-2145), *available at* http://news.ucsc.edu/2013/08/images/OCR_letter-of-findings.pdf.

63. *Id.*

64. As part of its investigation, OCR sent a survey regarding students’ experiences at the complained-of panels and screenings to 87 out of 91 students who had signed a petition protesting one of the events. OCR received only four responses, with two responders claiming they believed there was a hostile environment, and two who did not. OCR interviewed two responders. *Id.*

65. See Letter from Tammi Rossman-Benjamin to Arthur Zeidman (Oct. 17, 2013) (RE:

3. UC Irvine (OCR Complaint)

UC Irvine has been the subject of two separate investigations for tolerating a "hostile environment" for Jewish students, the first lasting from 2004–2007 and the second from 2007–2013.⁶⁶ Both investigations were ultimately closed with no adverse findings against the university.⁶⁷

The second investigation, closed on August 19, 2013, involved nine allegations that can be grouped into four categories: direct confrontations between students, anti-Semitic slurs, organized student expressive activity, and differential treatment by the University.⁶⁸ Under the first category, OCR determined the confrontations were "related to the different political views of the participants," not "national origin."⁶⁹ Under the second category, OCR investigated one allegation that a student cursed at a visiting speaker, who was a rabbi, and asked him, "Don't you have somebody's money to steal?"⁷⁰ OCR investigated the incident and concluded that though the statement was corroborated and was offensive, it was not "sufficiently serious as to deny or limit students' ability to participate in or benefit from the University's program."⁷¹ Under the third category, OCR investigated one allegation that "during May 2007's 'Israel: Apartheid Resurrected' week, the MSU [Muslim Student Union] distributed flyers attributing, allegedly falsely, an anti-Israel statement to Nelson Mandela," which complainants claimed "disseminat[ed] false information that inflames hatred for Jews and Israel."⁷² OCR determined that such flyers "constituted expression by MSU members on matters of public concern directed to the University community," and "does not constitute actionable harassment."⁷³ Finally, with respect to the fourth category, OCR investigated two allegations that the University discriminated

Appeal of OCR Dismissal at UC Santa Cruz) (on file with authors); Letter from Arthur Zeidman to Tammi Rossman-Benjamin (June 6, 2014) (RE: Appeal of Case No. 09-09-2145) (on file with authors).

66. See Letter from Arthur Zeidman to UC Irvine Chancellor Michael Drake (Nov. 30, 2007) (RE: Dismissal of OCR Case No. 09-05-2013) (on file with authors); see also Letter from Arthur Zeidman to UC Irvine Chancellor Michael Drake (Aug. 19, 2013) (RE: Dismissal of OCR Case No. 09-07-2205) (on file with authors).

67. See Letter from Arthur Zeidman to UC Irvine Chancellor Michael Drake (Nov. 30, 2007), *supra* note 66.

68. See Letter from Arthur Zeidman to UC Irvine Chancellor Michael Drake (Aug. 19, 2013), *supra* note 66.

69. *Id.* at 3–6 (concluding allegations 1–2 and 4–6 about confrontations between students were all based on political disagreements, rather than national origin harassment).

70. *Id.* at 6.

71. *Id.* at 4.

72. *Id.* at 6.

73. *Id.*

against Jewish students by enforcing a no-camera rule for MSU-sponsored speakers, and for failing to stop students from using the University trademark on a shirt that read, "UC Intifada: How you can help Palestine."⁷⁴ OCR determined there was no evidence to support an inference these messages were a form of unlawful discrimination against Jewish students.⁷⁵

B. Chilling Effect of OCR Investigations

Although OCR's conclusions in the UC investigations suggest it recognizes political speech about Israel is protected under the First Amendment, not a form of racially motivated harassment, the manner of the investigations nevertheless harmed students, faculty, and university administrators by chilling protected expression.⁷⁶ During the long duration of the investigations, in some cases lasting several years,⁷⁷ students and administrators at the target universities and elsewhere were unsure how OCR would decide the cases, and as such, were unsure what kind of expression could give rise to a Title VI violation.⁷⁸ Furthermore, as discussed in this Section, many individuals were concerned with the stigma of being associated with such an investigation, even if they were ultimately vindicated.

The stigma and chilling effect associated with these complaints and investigations has a disproportionate impact on Arab, Middle Eastern, Muslim, and South Asian community members, many of whom are actively engaged with this issue on campuses.⁷⁹ Such discouragement of

74. Letter from Arthur Zeidman to UC Irvine Chancellor Michael Drake (Aug. 19, 2013), *supra* note 66 at 2.

75. *Id.* at 6–7 (rejecting allegations 7 and 9).

76. See Letter from Zachary Pelchat of OCR to Chancellor Robert Birgeneau of UC Berkeley, *supra* note 49 (OCR's conclusions at UC Berkeley); Letter from San Francisco OCR to Carole Rossi, Chief Campus Counsel for UC Santa Cruz, *supra* note 62 (OCR's conclusions at UC Santa Cruz); Letter from Arthur Zeidman to UC Irvine Chancellor Michael Drake (Aug. 19, 2013), *supra* note 66 (OCR's conclusions at UC Irvine).

77. OCR notes that over 80% of its investigations are resolved within 180 days, but complex cases may take longer. See GPRA REPORT, DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS (last modified Sept. 15, 2003), available at <http://www2.ed.gov/about/offices/list/ocr/gpra.html>. At UC Irvine, an investigation was open from 2004–2007 and then from 2007–2013. At UC Santa Cruz, a complaint was filed in 2009, and an investigation was opened from October 2011 to August 2013. At UC Berkeley, an investigation was opened from September 2012 to August 2013, after over a year of litigation on the same issues. See *supra* note 76.

78. An investigation's long duration is also harmful when a complaint is meritorious. In that case, a four-year investigation means an entire class of students graduates before obtaining a remedy for a hostile environment.

79. See, e.g., Letter from Student Groups to U.S. Commission on Civil Rights (Nov. 7, 2012), available at http://sjpwest.org/wp-content/uploads/2012/11/UC-MSA-SJP-Letter-to-USCCR-11.8.2012-Final-Version_corrected.pdf (thirteen California chapters of the Muslim

civic engagement by these communities comes at a time when they face pervasive Islamophobia and racism,⁸⁰ contributing to their further marginalization. The following Section recounts some examples of how students, faculty, and administrators experienced the chilling effect.

1. Direct Chill at Subject Universities

The impact on students and administrators at UC Santa Cruz and UC Berkeley, for example, was clear. A UC Santa Cruz administrator whose residential hall had “sponsored” two of the panels at issue in the Title VI complaint explained at a public event,

The Department of Education’s Office [for] Civil Rights has been holding onto a complaint that was filed years ago [against UC Santa Cruz], as well as from other campuses Whether you agree with the complaint [or not,] we have been given no guidance from the federal government precisely about some of these issues [M]any of us on campuses are waiting for an interpretation . . . about how to view these issues from the federal government. That has not happened.⁸¹

Given a looming federal investigation that risks loss of funding, it stands to reason that administrators would tread carefully in the absence of clear federal guidance.

Students were also negatively impacted. In a December 2012 letter to then-UC President Mark Yudof, a number of civil rights organizations argued that the U.S. Department of Education’s investigation, combined with the *Felber* lawsuit and some of UC’s actions, had a chilling effect on students wanting to promote Palestinian human rights.⁸² For example:

Student Association joined a letter to the U.S. Commission on Civil Rights concerning the chilling effect on speech about the Israeli-Palestinian conflict on campus).

80. See, e.g., COUNCIL ON AMERICAN-ISLAMIC RELATIONS, *LEGISLATING FEAR: ISLAMOPHOBIA AND ITS IMPACT IN THE UNITED STATES* (2013), available at <https://www.cair.com/islamophobia/legislating-fear-2013-report.html>.

81. Academic Freedom and Campus Climate—A Forum at UC Santa Cruz, *Comments by UC Santa Cruz Provost Helen Shapiro on College Ten*, YOUTUBE (May 23, 2013), <http://www.youtube.com/watch?v=h3S3F2YCldA>; see also *Debating the University Campus Climate*, JADALIYYA (Aug. 9, 2013), <http://www.jadaliyya.com/pages/index/13395/debating-the-university-california-campus-climate> (quoting the Provost’s remarks).

82. Letter from Center for Constitutional Rights, Asian Law Caucus of San Francisco, American Muslims for Palestine, National Lawyers Guild-San Francisco Bay Area and Los Angeles Chapters, Council on American-Islamic Relations-San Francisco Bay Area to University of California President Mark Yudof (Dec. 3, 2012), available at <http://www>.

- “A former Cal SJP member had direct knowledge of the factual allegations in the UC Berkeley Title VI complaint and desired to give a declaration to correct the factual record. He ultimately declined . . . because he feared it would interfere with his visa application.”
- “Many students [involved in Cal SJP] declined to submit their names in declarations to the DOE because they fear being targeted and smeared as anti-Semites.”
- “A PhD student active with Cal SJP was told by his adviser that his public status as a Palestinian rights activist would be detrimental to his career”
- “A Muslim student of Arab descent stated that he would not get involved with Cal MSA’s political activities, for fear that it would jeopardize his chances of getting into graduate school.”
- “Muslim and Arab students at Berkeley Law are reluctant to join Law Students for Justice in Palestine because they fear their reputational interests would be at risk if such membership were public.”⁸³

Organizations that have filed or threatened these complaints have paraded this chilling effect as a victory, even when the complaints turn out to be factually meritless or legally unfounded.⁸⁴

2. Indirect Chill at Other Universities

OCR investigations may have a ripple chilling effect even outside the universities who are subjected to investigation. Federal civil rights investigations often attract tremendous media attention.⁸⁵

ccrjustice.org/files/CCR_ltr_Edley-Yudof_11%2030_Final.pdf.

83. Letter from Center for Constitutional Rights, *supra* 82 at 10–12.

84. See, e.g., Kenneth Marcus, *Standing up for Jewish Students*, JERUSALEM POST (Sept. 9, 2013), <http://www.jpost.com/Opinion/Op-Ed-Contributors/Standing-up-for-Jewish-students-325648> (“Seeing all these cases rejected has been frustrating and disappointing, but we are, in fact, comforted by knowing that we are having the effect we had set out to achieve These cases—even when rejected—expose administrators to bad publicity No university wants to be accused of creating an abusive environment Israel-haters now publicly complain that these cases make it harder for them to recruit new adherents Needless to say, getting caught up in a civil rights complaint is not a good way to build a resume or impress a future employer.”).

85. See, e.g., Teresa Watanabe, *Feds Investigate Claims of Anti-Semitism at UC Berkeley*, L.A. TIMES (Oct. 3, 2012), <http://latimesblogs.latimes.com/lanow/2012/10/anti-semitism-claims-uc-berkeley.html>; see also Peter Schmidt, *Education Dept. Investigates Complaint of Anti-Semitism at UC Santa Cruz*, CHRONICLE OF HIGHER EDUCATION (Mar. 15, 2011), <http://chronicle.com/article/Education-Dept-Investigates/126742>; see also Lisa W.

Advocacy groups may also try to publicize OCR's handling of particular investigations to influence policies at other universities without resorting to a Title VI complaint.⁸⁶ Administrators at other universities—prudent as they are—naturally act to avoid potential liability under Title VI or a government investigation that could be harmful to prestige, and therefore to fundraising efforts.

One measure of this effect in the context of activism about the Israeli-Palestinian conflict is the increase in reports from students of intrusive supervision, interference, investigation, condemnation, or other adverse actions from university administrators around the country.⁸⁷ The spike in reports at this time correlates with advocacy organizations' efforts to threaten Title VI complaints even when they are meritless.⁸⁸ For example, incidents of suspension, investigation, or censorship of speech have occurred at Northeastern University,⁸⁹

Foderaro, *At Yale, Sharper Look at Treatment of Women*, N.Y. TIMES (Apr. 7, 2011), <http://www.nytimes.com/2011/04/08/nyregion/08yale.html>.

86. See, e.g., Morton Klein, *ZOA Praises Office for Civil Rights—Opening Title VI Investigation of Anti-Semitic Environment At UC Santa Cruz Arising from Israel Bashing*, ZIONIST ORGANIZATION OF AMERICA (Mar. 14, 2011), <http://zoa.org/2011/03/102909-zoa-praises-office-for-civil-rights-opening-title-vi-investigation-of-anti-semitic-environment-at-uc-santa-cruz-arising-from-israel-bashing>; see also Kenneth Marcus, *Steering Jews at Columbia is Illegal and Discriminatory*, THE CUTTING EDGE NEWS (Oct. 5, 2011), <http://www.thecuttingedgenews.com/index.php?article=52854>.

87. Palestine Legal, a non-profit advocacy organization that provides legal support to Palestinian human rights activists in the U.S., reports that it received 172 requests for legal assistance in 2014 from campuses across the U.S., whereas in 2013 it received only 89. E-mail from Elizabeth Jackson, Staff Attorney at Palestine Legal to author Yaman Salahi (Feb. 27, 2015) (on file with authors).

88. See, e.g., Tammi Rossman-Benjamin, *Does NYU Have a Jewish Problem?*, N.Y. DAILY NEWS (June 1, 2014), <http://www.nydailynews.com/opinion/nyu-jewish-problem-article-1.1811838> (alleging that “mock eviction notices” in dorms highlighting demolition of homes by Israeli military in West Bank made Jewish students feel “attacked, threatened, and unsafe”); cf. *Groups Urge University of California to Monitor SJP Actions at So-Called ‘International Day of Action’*, BRANDEIS CENTER (Sept. 2, 2014), <http://brandeiscenter.com/blog/groups-urge-university-of-california-to-monitor-sjp-actions-at-so-called-international-day-of-action> (reporting on a letter signed by fifteen national organizations asking administrators to “monitor the behavior of SJP and other student organizations involved in the [upcoming protest against Israeli military actions], and ensure, through the use of campus police and administrative oversight, that behavior which violates university policy or the law will be swiftly and appropriately addressed”).

89. In July 2013, Northeastern University suspended Students for Justice in Palestine after it leafleted dorms with “mock eviction notices” to raise awareness about demolition of Palestinian homes. The suspension followed a one-year campaign by the Zionist Organization of America alleging that the school was tolerating a hostile environment under Title VI of the Civil Rights Act because professors had criticized Israel during classroom discussions, and because of pro-Palestinian student activism on campus. After the SJP chapter leafleted dorms with “mock eviction notices,” Northeastern suspended the

Columbia University,⁹⁰ Montclair State University,⁹¹ and Loyola University.⁹² The restrictions on student speech include both outright censorship and pressure on students to dilute their message.⁹³

C. The Evidence Points to Vibrant Political Debate and Deep Disagreements, Not Hostile Environments on the Basis of Race or Religion

OCR's dismissal of the three complaints against UC Berkeley, UC Irvine, and UC Santa Cruz would certainly be worrisome if Jewish students faced an unremedied hostile environment based on racial or religious harassment.

student group. It was reinstated after pressure from the ACLU of Massachusetts, the Center for Constitutional Rights, and the Foundation for Individual Rights in Education. See, e.g., Matt Rocheleau, *Suspension of Pro-Palestinian Student Group Stirs Debate*, BOSTON GLOBE (Mar. 14, 2014), <http://www.bostonglobe.com/metro/2014/03/13/suspension-pro-palestinian-student-group-northeastern-stirsdebate/fzDKNCTFeRyKLTpXbRIHO/story.html>; Peter Bonilla, *Free Speech Concerns Swirl Around Northeastern University's Suspension of Pro-Palestinian Group*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Mar. 14, 2014), <https://www.thefire.org/?s=free-speech-concerns-swirl-around-northeastern-universitys-suspension-of-propalestinian-group>.

90. Columbia Students for Justice in Palestine posted a banner with administrative approval in a designated banner space stating, "Stand for Justice, Stand for Palestine" and depicting a 1948 map of Palestine. After receiving complaints that the poster was "deeply threatening to Jewish students," Barnard removed the banner and has since placed a moratorium on all banners. See Sean Augustine-Obi, *SJP Hangs Pro-Palestine Apartheid Week Banner on Barnard Hall, Prompting Response from Dean Spar*, COLUMBIA LION (Mar. 2014), <http://columbialion.com/blog/sjp-hangs-pro-palestine-apartheid-week-banner-on-barnard-hall-prompting-response-from-hillel-board-member>; see also Samantha Cooney & Christian Zhang, *Students for Justice in Palestine Banner Removal Sparks Debate on Free Speech, Display Policy*, COLUMBIA SPECTATOR (Mar. 11, 2014), <http://columbiaspectator.com/news/2014/03/11/students-justice-palestine-banner-removal-sparks-debate-freespeech-display-policy>.

91. *Montclair State University: Pro-Palestinian Group Fined for 'Political' Expression*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, <http://www.thefire.org/cases/montclair-state-university-pro-palestinian-group-fined-for-political-expression> (last visited Apr. 14, 2015).

92. Press Release, Palestine Solidarity Legal Support, Loyola SJP Found Responsible for 1 of 6 Charges, Sanctioned with Probation and Dialogue Training (Nov. 3, 2014), available at <http://palestinelegalsupport.org/2014/11/03/press-release-loyola-sjp-found-responsible-for-1-of-6-charges-sanctioned-with-probation-dialogue-training>.

93. See, e.g., Radhika Sainath, *When 'Civility' is Code for Suppression*, HUFFINGTON POST (Dec. 22, 2014), http://www.huffingtonpost.com/the-center-for-constitutional-rights/when-civility-is-code-for_b_6366362.html.

It is undeniable that anti-Jewish animus exists in primary⁹⁴ and secondary schools,⁹⁵ and higher education.⁹⁶ But when such allegations have emerged from the highly contentious context of student activism about Israel and Palestine, upon investigation, they have often turned out to be grossly exaggerated, misleading, or simply false. OCR's investigations at UC Berkeley and UC Santa Cruz, for example, involved extensive outreach to dozens of Jewish students and Jewish student organizations over the course of several years, yet nevertheless failed to sustain the existence of a hostile environment on the basis of pro-Palestinian expression on campus.⁹⁷ OCR's investigation at Rutgers University—where a complainant claimed that a discriminatory fee was

94. See, e.g., Benjamin Weiser, *U.S. Cites Evidence of Anti-Semitism in School District*, N.Y. TIMES (Jan. 25, 2014), <http://www.nytimes.com/2014/01/25/nyregion/us-cites-evidence-of-anti-semitism-in-school-district.html> (discussing pervasive anti-Semitic harassment, including “white power” chants, Nazi salutes, and bullying of students in school, in New York school district); see also, Letter from OCR (RE: Case No. 09-11-1030, San Diego Unified School Dist.) (concerning allegations that Sephardic Jewish fifth-grade student was subjected to hostile environment and discriminatory treatment on basis of Jewish background) (available with authors).

95. See, e.g., Derek Shore, *Anti-Semitic Insult Slips Past Cupertino High School's Yearbook Editors* (NBC Bay Area television broadcast June 10, 2014), available at <http://www.nbcbayarea.com/news/local/Monta-Vista-High-School-Anti-Semitic-Insult-Slips-Past-Cupertino-High-Schools-Yearbook-Editors-262628171.html>; Natalie Martinez, *CPS Investigates Claims of Anti-Semitic Bullying* (NBC Chicago television broadcast May 29, 2014), available at <http://www.nbcchicago.com/news/local/CPS-Investigates-Claims-of-Anti-Semitic-Bullying-261177731.html>.

96. See, e.g., Jaclyn Schultz, *FBI Investigating Graffiti at Emory Frat House* (Fox Atlanta television broadcast Oct. 5, 2014), available at <http://www.myfoxatlanta.com/story/26709857/jewish-frat-spray-painted-with-swastikas-on-yom-kippur> (reporting that Jewish fraternity house vandalized with swastikas on Yom Kippur); see also Letter from OCR (RE: Case No. 09-11-2013, Whittier College) (concerning allegation that Jewish college student was not selected for basketball team because she is Jewish) (available with authors).

97. At UC Berkeley, OCR found no hostile environment for Jewish students after “send[ing] letters to the leaders of seven Jewish student organizations inviting members to contact OCR,” “interview[ing] the complainants, Jewish student witnesses provided by the complainants, and student witnesses who responded to letters OCR sent to University Jewish student organizations,” and conducting site visits to observe student protests. See Letter from Zachary Pelchat of OCR to Chancellor Robert Birgeneau of UC Berkeley, *supra* note 49, at 2-3. At UC Santa Cruz, OCR found no hostile environment for Jewish students after “sen[din]g a survey regarding students’ experiences surrounding [one event featuring criticism of Israel] to 87 of the 91 students who had signed a petition protesting the event in 2009,” and interviewing two of the only four students who responded to the survey. See Letter from San Francisco OCR to Carole Rossi, Chief Campus Counsel for UC Santa Cruz, *supra* note 62, at 2-3. At UC Irvine, OCR “interviewed the complainant and each of the students identified by the complainant as witnesses for each of the allegations,” and conducted site visits to observe campus protests. See Letter from Arthur Zeidman to UC Irvine Chancellor Michael Drake (Aug. 19, 2013), *supra* note 66, at 3.

charged to Jewish students at an event about Israel and Palestine—could not substantiate the allegation after interviewing several attendees.⁹⁸ Universities investigating similar allegations in the context of Israel/Palestine have concluded many (often made not by students but off-campus organizations) were false.⁹⁹

In some confrontations between students, OCR has concluded that political disagreement, not racial or religious bigotry, was at issue. For example, OCR analyzed the relationship between a Jewish student and Muslim students who lived in the same dorm at UC Irvine.¹⁰⁰ Apparently, the relationship became “contentious” after the Muslim students protested a lecture by Daniel Pipes, to the dismay of the Jewish student.¹⁰¹ According to OCR, “[t]he [Jewish] student stated that she had been friends with the Muslim students until she learned of their protest, at which point she stopped talking to them. The Muslim students responded by ceasing communication with her. The situation ultimately led to a confrontation between the [Jewish] student and the Muslim students, during which she called them anti-Semitic and they called her a racist.”¹⁰² Consequently, the Jewish student decided to move out of the dorm. OCR concluded that “[t]hese facts do not support a conclusion that the student was harassed because of her national origin; rather, they demonstrate that the conflict was related to the different political views

98. See Letter from OCR to Rutgers University, *supra* note 37, at 9–10 (“Witnesses OCR interviewed, including University staff, Jewish students identified by the complainant, Jewish and non-students involved with BAKA [another student group], corroborated that the \$5 fee [for event admission] was imposed approximately half an hour before the event began by the outside organizations. They further corroborated that after the fee was announced, both Jewish and non-Jewish attendees were required to pay the fee for entry. The student witnesses OCR interviewed who identified themselves as Jewish stated that they refused to pay the fee and were denied entry; however, OCR found no evidence that any Jewish individuals who paid the fee were denied entry, or that any non-Jewish individuals who refused to pay the fee were allowed to enter OCR determined that none of the witnesses were able to identify any instances in which students, either Jewish or non-Jewish, who did not serve as volunteers for the event were provided with wristbands and allowed to enter without paying the \$5 fee OCR did not find sufficient evidence to substantiate that any individuals were treated differently, based on national origin, with respect to imposition of the admission fee.”).

99. See, e.g., Statement from Dr. Charles Brown, Vice President of Student Affairs at Florida Atlantic University, available at http://www.fau.edu/explore/homepage-stories/Dr_Charlesbrown.php (last visited Mar. 21, 2015) (“[W]e have found no evidence that the postings were intended to target or intimidate individuals of any particular religion, national origin or faith.”).

100. See Letter from Arthur Zeidman to UC Irvine Chancellor Michael Drake (Aug. 19, 2013), *supra* note 66 at 3.

101. *Id.*

102. *Id.*

of the participants.”¹⁰³ OCR came to similar conclusions with respect to several other allegations at UC Irvine.¹⁰⁴

One need not assume bad faith on the part of complainants to conclude that hostile environment law is not the most suitable frame for understanding tensions that arise in the context of student activism and political disagreement about the Israeli-Palestinian conflict on campus. As the prior Section demonstrates, the three UC complaints essentially allege that the campus movement of students and faculty who criticize Israel for human rights violations inevitably create a hostile environment for Jewish students in effect if not intent. To accept this theory, one must accept a series of flawed assumptions that do not accurately reflect political and social dynamics on campus, and the complicated role that notions of identity, race, and religion play.

First, these complaints suggest that Jewish students monolithically hold one opinion, a positive one, about Israel or its policies. This notion is patently false, as the existence of student groups as politically diverse as Students for Justice in Palestine,¹⁰⁵ Jewish Voice for Peace,¹⁰⁶ J Street

103. Letter from Arthur Zeidman to UC Irvine Chancellor Michael Drake (Aug. 19, 2013), *supra* note 66 at 3.

104. *Id.* at 4 (concluding that the incident in which camera was allegedly shoved in reporter's face was based on political views, not national origin); *id.* (concluding that the incident in which student was allegedly called a “whore,” “slut,” “animal,” and the “f-word” was based on political views, not national origin (though saying nothing about the possibility of gender harassment)); *id.* at 5 (concluding that the incident in which Muslim students allegedly asked a non-Jewish student to stop filming the audience at a lecture was based on perceived political views, not perceived national origin); *id.* at 6 (concluding that administrator's alleged reference to student as “troublemaker” for “history of actively condemning pro-terrorist and academically dishonest events” was based on political views, not national origin).

105. See STUDENTS FOR JUSTICE IN PALESTINE AT UC BERKELEY, http://calsjp.org/?page_=483 (last visited Mar. 21, 2015) (“[A] group of students, faculty, and community members working together at the University of California, Berkeley, in solidarity with the struggle of the indigenous Palestinian people against apartheid and occupation.”).

106. See JEWISH VOICE FOR PEACE, <http://jewishvoiceforpeace.org/content/jvp-mission-statement> (last visited Mar. 21, 2015) (“Jewish Voice for Peace members are inspired by Jewish tradition to work together for peace, social justice, equality, human rights, respect for international law, and a U.S. foreign policy based on these ideals. JVP opposes anti-Jewish, anti-Muslim, and anti-Arab bigotry and oppression. JVP seeks an end to the Israeli occupation of the West Bank, Gaza Strip, and East Jerusalem; and self-determination for Israelis and Palestinians; a just solution for Palestinian refugees based on principles established in international law; an end to violence against civilians; and peace and justice for all peoples of the Middle East.”).

U,¹⁰⁷ Open Hillel,¹⁰⁸ Keshet Enoshi,¹⁰⁹ and Tikvah: Students for Israel¹¹⁰ demonstrates—not to mention the active involvement of Jewish students in Students for Justice for Palestine.¹¹¹ That some groups may sometimes acknowledge dissenting Jewish viewpoints but then privilege their own as the “real” or more “legitimate” Jewish viewpoint does not resolve the issue.¹¹²

Second, it is flawed to assume that even if Jewish students monolithically identified with or supported Israel in the same way, such identification would render them absolutely intolerant of other perspectives. A recent study by a UC Santa Cruz graduate and undergraduate student suggests that attachment to Israel amongst Jewish students at UC campuses did not predict whether those students would have a positive or negative encounter with Arab or Palestinian peers. Rather, the more relevant factor was whether students acknowledged competing narratives.¹¹³ Thus, just because

107. See J STREET U, <http://www.jstreetu.org/about/who-we-are> (last visited Mar. 21, 2015) (“J Street U is the student organizing arm of J Street, the political home for pro-Israel, pro-peace Americans.”).

108. See OPEN HILLEL, <http://openhillel.org/about.php> (last visited Mar. 21, 2015) (“Open Hillel is a student-run campaign to encourage inclusivity and open discourse at campus Hillels. We seek to change the ‘standards for partnership’ in Hillel International’s guidelines, which exclude certain groups from Hillel based on their political views on Israel.”).

109. See KESHER ENOSHI, JEWISH STUDENT UNION AT UC BERKELEY, https://www.ocf.berkeley.edu/~jsuucb/Keshet_Enoshi.html (last visited Mar. 21, 2015) (“[A] growing community of students dedicated to engaging directly with social change organizations and activists in Israel.”).

110. See TIKVAH: STUDENTS FOR ISRAEL, <http://tikvahsf.berkeley.edu> (last visited Mar. 21, 2015) (“Tikvah: Students for Israel (SFI) is a group of students at UC Berkeley dedicated to advocating for Zionism—the national movement of the Jewish people for self-determination in their homeland, Israel.”).

111. See, e.g., Tom Pessah, *Through the Looking Glass—Five Years in Students for Justice in Palestine*, MONDOWEISS (Jan. 19, 2011), <http://www.mondoweiss.net/2011/01/through-the-looking-glass—five-years-in-students-for-justice-in-palestine> (an Israeli-Jewish student’s reflection on five years of involvement with a student group); see also Sue Fishkoff, *At Berkeley Campus, Jewish Students on Far Left and Far Right on Israel Talk About Their Motivations*, JEWISH TELEGRAPH AGENCY, http://www.thejewishchronicle.net/view/full_story/12220427/article-at-berkeley-campus—jewish-students-on-far-left-and-far-right-on-israel-talk-about-their-motivation.

112. See, e.g., Jonathan S. Tobin, *Jews Who Aid the War on Israel*, COMMENTARY MAGAZINE (June 25, 2014), <https://www.commentarymagazine.com/2014/06/25/jews-who-aid-the-war-on-israel-presbyterians-divestment-jewish-voices-for-peace> (“Jewish Voices for Peace has every right to do or say as they like But they should never be allowed to do so under the banner of the Jewish community [They] must also never be treated as a legitimate partner in any Jewish community or on any college campus.”); see also Rabbi Eric H. Yoffie, *How a Radical Anti-Israel Jewish Group Colluded With the U.S. Presbyterian Church*, HAARETZ (June 23, 2014), <http://www.haaretz.com/opinion/premium-1.600579>.

113. Nadya R. Tannous & Ella Ben Hagai, *Encounter-Point: Predictors of Positive and Negative Contact Between Jewish and Arab Communities on College Campuses*, in THE

one holds a strong opinion does not foreclose the possibility of tolerating other opinions in the classroom or on campus.¹¹⁴ One Jewish student at UC Santa Cruz publicly criticized the Title VI complaint filed against the university, explaining:

Most of the anti-Semitism in Rossman-Benjamin's complaint comes from Jewish professors and students who criticize Israel. I am a Jewish [sic] and a Zionist, but if we accept the logic of her complaint, I am an anti-Semite because I have participated in the events she calls anti-Semitic. So if the federal government's investigation finds truth in Rossman-Benjamin's complaint and my university puts an end to criticism of Israel, I will have been written out of my own Jewishness.¹¹⁵

Third, the complaints' narrative requires assuming that students who are *not* able to tolerate other perspectives then suffer a civil rights injury when exposed to those views. That notion, aside from being an incredible claim, is at odds with the Supreme Court's observation that "[t]eachers and students must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."¹¹⁶ It turns the purpose of a university—free intellectual inquiry—on its head by casting exposure to different perspectives and alternative viewpoints as a form of trauma rather than education.

Fourth, the complaints' narrative requires treating expression critical of a government's policies or history, in this case Israel's, as equivalent to an attack on individual students who may identify with

THIRTEENTH ANNUAL STANFORD UNDERGRADUATE PSYCHOLOGY CONFERENCE 15 (May 17–18, 2013), http://www.stanfordconference.org/programs/SUPC_2013_Program.pdf.

114. See also Zev Hurwitz, *The 'Two-Station Solution' for Campus Conflict*, NEW VOICES (Mar. 3, 2015), <http://newvoices.org/2015/03/03/the-two-station-solution-for-campus-conflict> ("Last May, I walked in front of the Israel 'Apartheid' Wall at my campus during Justice in Palestine Week, wearing my yarmulke, and a member of Students for Justice in Palestine called me a name. The name that the SJP member called me was certainly not something I anticipated being called at that time or place. 'Hi Zev!' In what world is an SJP affiliate going to be friendly to an openly Zionist, visibly Jewish student wearing an Israeli flag T-Shirt during the most contentious week of the year for pro-Israel students in front of the largest icon for the BDS movement on campus? This only occurs in a crazy world where Jewish and Muslim students can recognize one another for being what we truly are at the core: Peers.").

115. Shani Chabansky, *Living Title VI: A UC Santa Cruz Account*, JEWISH DAILY FORWARD (Feb. 23, 2012), <http://blogs.forward.com/forward-thinking/151936/living-title-vi-a-uc-santa-cruz-account> (critique by Jewish and pro-Israel student of Title VI complaint at UC Santa Cruz).

116. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

that government. That proposition would leave very little room for “robust and discordant”¹¹⁷ expression about any government in the world, because a line can be drawn from any nation-state to an aspect of individual identity. To immunize political philosophies and institutions from critique on the basis of personal identification with those philosophies or institutions neglects that “[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of *political and social changes* desired by the people,”¹¹⁸ and that “[c]ore political speech occupies the highest, most protected position” under the First Amendment.¹¹⁹

Fifth, treating this variety of political speech as relevant to a “hostile environment” analysis also requires implicit agreement with the notion that anti-Jewish animus is the sole, or most likely, motivation for criticism of Israel. In other words, one would have to hold that such political views are so devoid of merit, so far at odds with any reasonable interpretation of history or current political events, that they are best explained by bigotry.¹²⁰ It also requires ignoring the frequent condemnations of bigotry and racism against Jews, Arabs, and Muslims issued by student groups of all political perspectives.¹²¹

Finally, it bears noting that the complaints’ narrative completely omits consideration of whether Palestinian or other Arab and Muslim students have feelings about how their professors or fellow students discuss the Israeli-Palestinian conflict. One must assume that, like Jewish students’ experiences, these students’ experiences are also diverse, ranging from hurtful and offensive to enriching and edifying. Despite examples of unsavory encounters,¹²² however, it would, for the same

117. See, e.g., Letter from Zachary Pelchat of OCR to Chancellor Robert Birgeneau of UC Berkeley, *supra* note 49, at 3 (“In the university environment, exposure to such robust and discordant expressions, even when personally offensive and hurtful, is a circumstance that a reasonable student in higher education may experience.”).

118. *Roth v. U.S.*, 354 U.S. 476, 484 (1957) (emphasis added).

119. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring).

120. See Letter from Student Groups to U.S. Commission on Civil Rights, *supra* note 79, at 3 (explaining that “[o]ur groups’ criticism of Israel is not based on the identity of the majority of its citizens, but on the fact that it cannot be denied with any seriousness that Israel’s occupying army makes daily life miserable for millions of civilians, including the relatives and friends of members of our organizations”).

121. See, e.g., *id.* at 2-4 (“We agree with the goal of combating all forms of bigotry, including anti-Semitism . . . Jewish, Muslim, and Arab students all have an interest in non-discriminatory educational settings.”).

122. See, e.g., Sarah Aziza, *I am Palestinian, and I am Human, and I am Here*, MONDOWEISS (June 3, 2014), <http://mondoweiss.net/2014/06/palestinian-human-here> (Palestinian undergraduate student at University of Pennsylvania explaining, “[t]here are few things more exhausting than being told you don’t exist, that your heritage is both a lie

reasons explained above, be going too far to suggest that universities should prohibit campus celebrations of "Israeli Independence Day" or expression supportive of Israeli policies or critical of Palestinian political leaders because they allegedly create a hostile environment for Palestinian students.¹²³

IV. Assessing and Improving OCR's Performance Under the First Amendment

OCR's handling of complaints and investigations at these three UC campuses, and the ensuing chilling effect, highlight two main gaps in OCR's First Amendment policy. First, the Department does not provide enough *substantive* guidance to universities to help them distinguish between protected expression and unprotected harassment that might justify a federal investigation. Second, the Department has no guidance that recognizes that the *manner* of a federal investigation may have an inherent chilling effect on student organizations or student expression, even when an investigation does not intentionally target protected expression. This Section explains where these shortcomings lie and proposes a solution.

A. The Need for Substantive Guidance from OCR Distinguishing Protected Expression from Potentially Unprotected Harassment.

Although OCR's conclusions in the UC investigations suggest it recognizes political speech about Israel is protected under the First Amendment, not a form of racially motivated harassment, these conclusions do not constitute official policy or guidance but rather decisions in particular cases.¹²⁴ OCR's public policies presently fall far

and a disgrace, that your identity is untrue and also criminal"); David McCleary & Kumars Salehi, *Injustices Against Palestinian Students Go Unreported*, DAILY CALIFORNIAN (last updated Mar. 20, 2015) <http://www.dailycal.org/2015/03/20/injustices-against-palestinian-students-go-unreported> ("During the protest, a man arguing with a Palestinian student asked the student why the average Palestinian wants to blow himself up on a bus. The comment was witnessed by several students.").

123. See, e.g., *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (holding that on-campus protest by student group that included stomping on flags depicting the Arabic word for God was protected by the First Amendment, even if it caused offense to some Muslim students).

124. See, e.g., Letter from Zachary Pelchat of OCR to Chancellor Robert Birgeneau of UC Berkeley, *supra* note 49, at 3 ("This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and it should not be relied upon, cited, or construed as such.").

short and lack the nuance necessary to fully protect First Amendment interests on campus. In its 1994 policy guidance on racial harassment, OCR noted that “[a] violation of Title VI may also be found if a recipient has created or is responsible for a racially hostile environment, i.e., harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient.”¹²⁵ Despite reference to “verbal, graphic, or written” conduct, potentially implicating First Amendment interests, the 1994 policy makes no reference to the First Amendment.¹²⁶

In 2003, OCR issued public guidance on the First Amendment, stating: “OCR’s regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution,” and “OCR’s regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment.”¹²⁷ This recognition of First Amendment limitations on its jurisdiction, however, is circular: it does not provide substantive guidance on how to distinguish between protected expression and unprotected conduct. Beyond that, it offers no more than: “the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR.”¹²⁸ But in stating that offensiveness “standing alone” is not a basis for a hostile environment,¹²⁹ the policy actually suggests that offensiveness *could* form the basis for a hostile environment without explaining in what circumstances.

OCR need not, and cannot, come up with a rule that definitively answers every possible set of facts. That is the nature both of harassment and of the First Amendment; inquiries are often fact-intensive, and bright-line rules are not always available to distinguish protected expression from unprotected harassment.¹³⁰ But OCR does not need to

125. Notice of Investigative Guidance, 59 Fed. Reg. 11448-01 (Mar. 10, 1994), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/race394.html> (investigative guidance on racial incidents and harassment against students).

126. *Id.*

127. Letter from Assistant Secretary, Office of Civil Rights, Department of Education, to Colleague (Jul. 28, 2003) (RE: First Amendment), *available at* <http://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

128. *Id.*

129. *Id.*

130. See, e.g., Martha McCarthy, *Anti-Harassment Provisions Revisited: No Bright-Line Rule*, 2008 BYU EDUC. & L.J. 225, 249 (2008) (“Currently, educators understandably are insecure in balancing public schools’ obligations and students’ rights in terms of appropriate and protected expression in public schools. The Supreme Court’s prior

adopt "one size fits all" language to meaningfully defend core First Amendment rights. OCR could, for example, publish a nonexhaustive list of activities or modes of expression that clearly *are* entitled to First Amendment protection and do not constitute actionable harassment under a Title VI hostile environment analysis. University administrators would then have authoritative guidance reassuring them they do not risk federal investigation by facilitating robust expression on campus, or refraining from disciplining or investigating speech clearly within the bounds of First Amendment protection.

Helpful guidance in this regard could distinguish racially motivated conduct or expression from speech that clearly does not raise Title VI concerns. At least some of OCR's internal guidance and training fulfills this purpose. For example, a 2010 internal OCR memorandum explains that "[c]omplaints that involve the alleged harasser's support for, or opposition to, a country's policies raise First Amendment issues."¹³¹ Some of OCR's internal training presentations make clear that graffiti that reads "Freedom for Palestinians," for example, is not a basis for Title VI jurisdiction because "[t]here is no evidence that the graffiti was motivated by animus against students because of their actual or perceived Jewish ancestry or ethnic characteristics."¹³² Public guidance that expands upon these internal guidelines, providing clear and pertinent examples of speech that do *not* give rise to a Title VI violation, could help mitigate the chilling effect at the university level.

Courts have also recognized the importance of adopting legal rules that are aimed at minimizing potential chilling effects. For example, the Ninth Circuit adamantly rejected a Title VI hostile environment

rulings have not yielded clear legal principles to guide the lower courts in this regard."); *cf.* *Crockett v. Rash Curtis & Assocs.*, 929 F. Supp. 2d 1030, 1032 (N.D. Cal. 2013) ("No bright-line rule guides courts in determining which conduct fails to establish harassment as a matter of law . . ."); *Independence Inst. v. Gessler*, 936 F. Supp. 2d 1256, 1274 (D. Col. 2013) ("Because of the flexibility of the standard, there are no bright line rules that separate permissible election-related regulation from unconstitutional infringements of First Amendment Freedoms.").

131. Memorandum from Assistant Secretary Russlynn Ali to All OCR Office Directors 5 (Dec. 1, 2010) (RE: OCR's jurisdiction over discrimination against members of religious groups.) (available with authors). The guidance offers a scenario in which Sikh students claim their rights were violated because "they were subjected to verbal abuse by Pakistani students because they staged a campus rally in support of India's policy towards Kashmir." *Id.* It concludes "OCR would decline to exercise jurisdiction absent any evidence that the alleged harassers thought that the Sikh students were Indian and harassed them on that basis. Here, the alleged harassment was not based on the student's real or perceived citizenship or residency, but on their support for another country's policy." *Id.*

132. OCR Training Slide titled "Racial Harassment: Example 4," provided in response to Freedom of Information Act request filed by author Yaman Salahi.

claim premised on the inclusion of literary classics that include racial stereotypes in a high school curriculum because “the threat of future litigation would inevitably lead many school districts to ‘buy their peace’ by avoiding the use of books or other materials that express messages—or simply use terms—that could be argued to cause harm to a group of students.”¹³³ The Court there noted that “complaints based on speech protected by the First Amendment have far-ranging and deleterious effects, and the mere threat of civil liability can cause potential defendants to steer far wider of the unlawful zone.”¹³⁴ In a separate case, the Ninth Circuit warned against judicial rules about offensive speech that might force “colleges . . . to act as the hall monitors of academia.”¹³⁵ If schools were required to respond to every instance of a professor airing a controversial and offensive viewpoint, then “schools [would] inevitably reassess whether hiring a lightning rod like [Professor] Kehowski—or, for that matter, Larry Summers or Cornel West—is worth the trouble,” and academic speech would lose “the breathing room it requires.”¹³⁶

In addition to self-imposed censorship that results from “chill,” students may also face hurdles from cautious administrators. Predictably, in the absence of clear guidance, administrators who are uncertain about whether their actions could give rise to a federal investigation that risks loss of federal funding may steer clear of potential liability.¹³⁷ When the boundaries are unclear, that will often mean avoiding even gray areas, too.¹³⁸ In such cases, universities will predictably violate students’ First Amendment rights, whether intentionally or not, in an effort to avoid Title VI liability.¹³⁹ Clear statements of policy, thus, can help mitigate both direct and indirect chilling effects.

133. *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1029 (9th Cir. 1998) (holding that use of *The Adventures of Huckleberry Finn* in literature course could not be basis for Title VI hostile environment claim).

134. *Id.* (citations and quotations omitted).

135. *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 709 (9th Cir. 2010) (dismissing Title VII hostile environment claim brought by college professors against college when it declined to discipline a professor who sent offensive e-mails to a university listserv in favor of immigration rules that would support “preservation of the White majority”).

136. *Id.*

137. See *Monteiro*, 158 F.3d 1022.

138. See *id.*

139. Students whose First Amendment rights are violated often have no legal remedy aside from federal or state litigation, a remedy that has high overhead costs and will rarely be pursued except in the most egregious circumstances. Thus, while it is relatively easy to file a Title VI complaint with OCR, it may require years of investment to research and pursue a First Amendment lawsuit.

OCR would not be the first federal agency to propound guidance aimed at minimizing the chilling effect of its investigations. In the 1990s, the Department of Housing and Urban Development (hereinafter "HUD") faced public outcry and litigation after it investigated unlawful "threats" and "intimidation" under the Fair Housing Act based on the activities of a group of activists against a proposed housing development for those with mental health needs in Berkeley, California.¹⁴⁰ The activists voiced their opposition in op-eds, at rallies, and through pamphlets.¹⁴¹ Prompted by outrage over the investigation, HUD adopted a new First Amendment policy clearly stating it would not investigate expression or conduct "directed toward achieving action by a governmental entity or official" if they "do not involve force, physical harm, or a clear threat of force or physical harm to one or more individuals."¹⁴² HUD's policy also specifically delineated the following as forms of protected expression:

- distributing fliers, pamphlets, brochures, posters, or other written materials to the public at large;
- holding open community meetings;
- writing articles or letters to the editor or making statements in a newspaper;
- conducting peaceful demonstrations;
- testifying at public hearings;
- communicating directly with a governmental entity concerning official governmental matters.¹⁴³

OCR could adopt a policy explaining that similar forms of communication are clearly protected, particularly where directed at voicing support for or opposition to a government's actions.

By adopting such guidance, OCR could also help insulate its

140. See 42 U.S.C. § 3617 (1968) ("It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.").

141. See Lisa W. Foderaro, *Protests of Housing Plan Lead to HUD Inquiry, and Debate*, N.Y. TIMES (Sept. 1, 1994), <http://www.nytimes.com/1994/09/01/nyregion/protests-of-housing-plan-lead-to-hud-inquiry-and-debate.html>; see also HUD to End Inquiries Into Protests of Its Proposals, N.Y. TIMES (Sept. 3, 1994), <http://www.nytimes.com/1994/09/03/us/hud-to-end-inquiries-into-protests-of-its-proposals.html>.

142. Memorandum from Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity (Sept. 2, 1994) (RE: First Amendment), available at http://www.fairhousing.com/index.cfm?method=page.display&pagename=HUD_resources_hudguid4.

143. *Id.*

investigators from potential litigation by those whose protected political advocacy is unconstitutionally chilled by an investigation. The HUD investigation that led to Assistant Secretary Roberta Achtenberg's groundbreaking First Amendment policy also prompted a 42 U.S.C. § 1983 suit against the San Francisco area HUD investigators who initiated and conducted the investigation. In *White v. Lee*, the Ninth Circuit ruled in favor of the plaintiffs, denying qualified immunity to the investigators who conducted the investigation into protected activity—like op-eds, protests, and pamphlets—because the manner of the investigation had an unconstitutional chilling effect in violation of clearly established law.¹⁴⁴ The *White* principle should guide OCR's investigations.¹⁴⁵

B. The Need for Procedural Guidance From OCR That the Manner of an Investigation May Have a Chilling Impact When Protected Expression is Intermingled With Unprotected Conduct

OCR's policies do not acknowledge that government investigations may have a chilling effect on legitimate political expression, even when they do not result in direct sanction or do not directly involve protected speech. Perhaps that is because allegations relating to political activism addressed to the public at large and aimed at changing public policy are rarely filed with OCR. Unlike complaints that allege targeted harassment by individual bullies or a small group of bullies, the complaints discussed above allege that organizations with multiple political, cultural, and social programs addressed to the campus community at large, like the Muslim Student Association and Students for Justice in Palestine, are responsible for cultivating a hostile environment based on either the programming

144. *White v. Lee*, 227 F.3d 1214, 1237 (9th Cir. 2000) ("It is axiomatic that when the actions of government officials so directly affect citizens' First Amendment rights, the officials have a duty to take the least intrusive measures necessary to perform their assigned functions.").

145. It is interesting to note that Kenneth Marcus, the founder of the Brandeis Center who has cheered the use of OCR complaints to chill protected political activity when it comes to criticism of Israel, was one of the lawyers who represented the *White* plaintiffs at the Ninth Circuit. See Marcus, *supra* note 84. Little more than a decade ago, Marcus argued in his brief to the Ninth Circuit that "investigations of protected political speech violate the First Amendment." See Brief of Plaintiffs-Appellees at 27, *White v. Lee*, 227 F.3d 1214, No. 99-15098 (9th Cir. Dec. 29, 1999). It is hard to square that language with Marcus' present-day advocacy for government and university monitoring and investigation of political speech. Like old friends, it seems, the First Amendment and its proponents can sometimes drift apart.

itself or individual acts in the context of that programming.¹⁴⁶ In those circumstances, an investigation is at much greater risk of chilling legitimate student expression and association.

That a complaint is politically focused or motivated, however, is not sufficient grounds to skip a fair and neutral review.¹⁴⁷ OCR should be careful not to react to this particular wave of complaints—which are clearly aimed at curbing political critique of the state of Israel—in a manner that undermines legitimate civil rights concerns, whether involving Jewish students or others. As Judge Seeborg noted in his dismissal of the *Felber* lawsuit, a “substantial portion” of the allegations in these complaints is protected under the First Amendment.¹⁴⁸ Nevertheless, the complaints discussed above also included allegations related to unprotected expression, like graffiti, shoving, and so on. Whereas some allegations may not sustain a violation without infringing First Amendment freedoms (i.e., a student group’s mock checkpoint event or an academic panel discussing Israel/Palestine), others might (i.e., allegations involving assaults and threats). The mere fact that some expression is protected is not sufficient to permit OCR or university administrators to turn a blind eye to unprotected conduct that may rise to the level of actionable harassment and intimidation. Furthermore, the mere fact that bona fide harassment is politically motivated, rather than based on race or national origin, does not render it protected expression (though it could suggest a lack of Title VI jurisdiction if not based on race, color, or national origin).

Although certain allegations in the three UC cases discussed above that do not involve protected expression have been publicly denied and disputed, OCR must treat them as true when deciding whether to open an investigation.¹⁴⁹ If an investigation is opened in such circumstances, however, OCR must be aware of the chilling effect the investigation may have on the protected activities of relevant students or student organizations. OCR could take measures to minimize the potential chilling effect, including ensuring that an investigation is not unreasonably long or broad in scope, and

146. See Part III.A, *supra*.

147. This raises a separate issue that OCR’s complaint process is more vulnerable to abuse or frivolous complaints than federal litigation. Whereas litigants are restricted by Rule 11 of the Federal Rules of Civil Procedure, there are no penalties for filing a frivolous Title VI complaint with OCR (and indeed adding penalties risks deterring even meritorious complainants). Moreover, filing a Title VI complaint with OCR comes with virtually no financial costs and does not require the overhead of federal litigation, like discovery and so on, or a lawyer—factors that might also deter frivolous complaints.

148. See *Felber v. Yudof*, 851 F. Supp. 2d 1182 (N.D. Cal. 2011).

149. See OFFICE OF CIVIL RIGHTS, DEPT. OF EDUC., CASE PROCESSING MANUAL §§ 104–108 (2015), available at <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

reminding universities and complainants alike that its investigations do not require core political speech to be curbed on campus.

To deal with this problem, OCR should adopt a policy with language similar to HUD's First Amendment policy, which recognizes that "the power and resources of the state are unique and that, for many private citizens, being the subject of a 'federal investigation' can be inherently and unavoidably 'chilling.'"¹⁵⁰ Although the subject of an OCR investigation is technically a university, not individual students, professors, or student organizations, the chilling effect is nevertheless experienced by those third parties because of the stigma of being associated with an investigation or, worse, being found to have caused a civil rights violation. Furthermore, students and faculty may also experience a chilling effect based on the way university administrators behave when they try, in good faith, to avoid Title VI liability, sometimes erring on the side of caution and impinging on those third parties' freedom of expression.

Conclusion

American university campuses are home to a range of opinions about Israel, Palestine, and the United States' role in the Middle East. Some are deeply defensive of the status quo policies, while others are vehemently critical of it.¹⁵¹ Though universities are not strangers to political disagreements, this topic is often characterized as "divisive."¹⁵² That, however, is no reason to eschew the open exchange of ideas, as UC Berkeley Chancellor Nicholas Dirks has suggested doing, saying, "when issues are inherently divisive, controversial and capable of arousing strong feelings, the commitment to free speech and expression can lead to division and divisiveness that undermine a community's foundation."¹⁵³ Such

150. See Memorandum from Roberta Achtenberg, *supra* note 142.

151. See, e.g., Zachary Lockman, *Contending Visions of the Middle East: The History and Politics of Orientalism* (2d. ed., 2009) (discussing the development of scholarship on the Middle East, including an overview of the major scholarly debates in the field throughout the twentieth century).

152. See, e.g., *Unity, Not Divisiveness*, DAILY CALIFORNIAN (Sept. 19, 2014), <http://www.dailycal.org/2014/09/19/unity-divisiveness> (describing student government resolutions related to academic relations with Israeli institutions as "naturally divisive"); Brian Khorshad, *UCSA Unfairly Sides on Divisive Issue*, DAILY BRUIN (Oct. 23, 2012), <http://dailybruin.com/2012/10/23/uc-sa-unfairly-sides-on-divisive-issue> (characterizing student government resolution related to Israeli-Palestinian conflict as "divisive").

153. Ken White, *UC Berkeley Chancellor Nicholas Dirks Gets Free Speech Very Wrong*, POPEHAT (Sept. 6, 2014), available at <https://www.popehat.com/2014/09/06/u-c-berkeley-chancellor-nicholas-dirks-gets-free-speech-very-wrong>.

advice might be appropriate for settings where social norms call for feigned harmony, like a wedding ceremony or Thanksgiving dinner, but they have no place in "[t]he crucible of new thought,"¹⁵⁴ the university, where disagreement and debate are the norm. It is hard to imagine that we would indulge calls for other potentially "divisive" topics—like abortion, police brutality, affirmative action—to be kept out of the classroom and off the quad.

As with any contentious issue, not all engagement with this topic is of the calm, measured, deliberative variety—nor should it be. In striking down a campus "civility" code, one judge has commented that rules "permitting only those forms of interaction that produce as little friction as possible, forms that are thoroughly lubricated by restraint, moderation, respect, social convention, and reason . . . reasonably can be understood as prohibiting the kind of communication that is necessary to use to convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause."¹⁵⁵ Such protection has been determined by other courts to reach even to "political hyperbole"¹⁵⁶ and "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."¹⁵⁷ The forgiving character of the First Amendment stems from the recognition that "[t]he language of the political arena . . . is often vituperative, abusive, and inexact."¹⁵⁸ Simply put, some situations call for something more than politely worded critique.

That said, in some cases, some partisans from all sides on this issue have expressed views that clearly are racist or hateful on campus. In responding, OCR and university administrators must be careful not to throw out the baby with the bath water, distinguishing isolated instances of bigotry that are rightly shunned from the lawfully expressed political views of broader movements. The greater responsibility for addressing such instances, however, rests with student organizations and movements themselves. They are best positioned and have the most credibility to reaffirm the values of their own ranks and to

154. *White v. Davis*, 13 Cal. 3d 757, 770 (1975).

155. *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1019 (N.D. Cal. 2007).

156. *Watts v. United States*, 394 U.S. 705, 708 (1969) (antiwar speaker at rally who said "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." entitled to First Amendment protection).

157. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (requiring public figures to demonstrate actual malice to recover damages in defamation suits).

158. *Watts*, 394 U.S. at 708.

object when individuals veer from collectively held values, a practice in which they already engage.¹⁵⁹

At the same time, universities have a responsibility to ensure that students are not deprived of their ability to obtain an education based on protected characteristics like race, color, or national origin. OCR has a statutory duty to ensure that universities rise to the task.¹⁶⁰ When responding to hostile environment claims that arise out of charged political disputes like the three UC cases discussed above however, OCR's response must be cognizant of the broader context in which they arise. It must understand that its investigations may resonate in harmful ways it does not intend. Even though OCR's conclusions in the three UC cases ultimately vindicated the universities and the student organizations involved, the ambiguity of OCR's public guidance about the First Amendment paired with its handling of the three UC complaints (opaque investigations lasting upwards of three years) contributed to a harmful chilling effect. In the three UC cases discussed above, for example, universities and student organizations around the country were given the impression that core political speech about the Israeli-Palestinian conflict by students or faculty could make universities vulnerable to Title VI liability.

OCR's conclusions in the three UC cases and its internal legal memoranda and training suggest it should have no substantive disagreement with the proposals in this Article. With respect to the broad protections guaranteed to political speech, the guidance we propose simply calls on OCR to operationalize the principles it applied to the three UC cases and which are unambiguous in judicial precedent. With respect to minimizing the chilling effect associated with its investigations, we simply call for adoption of a policy that has precedent in other federal agencies and will improve OCR's ability to carry out its mandate while minimizing unintended consequences. These policies would be beneficial not only to students, but also to university administrators who want to

159. See, e.g., An Apology from the SJP Vassar General Body (May 13, 2014), <https://web.archive.org/web/20140823184048/http://sjpvassar.tumblr.com/post/85678589400/an-apology-from-the-sjp-vassar-general-body> ("condemn[ing] any and all hate speech including any form of anti-Semitism" after an individual student used a group social media account to post anti-Semitic material); Hillel at UCLA Student Board, et al., *Jewish and Pro-Israel Groups at UCLA Condemn Posters accusing SJP of anti-Semitism*, DAILY BRUIN (Feb. 24, 2015), <http://dailybruin.com/2015/02/24/submission-jewish-groups-at-ucla-condemn-posters-accusing-sjp-of-anti-semitism>.

160. See *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. Of Educ.*, 526 U.S. 629 (1999).

do the right thing but need more guidance from OCR.¹⁶¹ And they would protect OCR investigators from potential civil liability for chilling legitimate expression.¹⁶² Finally, they would preserve the integrity of Title VI, an indispensable tool that was intended to protect students from campus discrimination and marginalization, not to silence political debate.

161. See, e.g., *Comments by UC Santa Cruz Provost Helen Shapiro on College Ten*, *supra* note 81.

162. See, e.g., *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000).